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POSITIO[illegible] STATES BEFORE FRENCH COURTS

BY
ELEANOR WYLLYS ALLEN, PH.D.

New York
THE MACMILLAN COMPANY
1929

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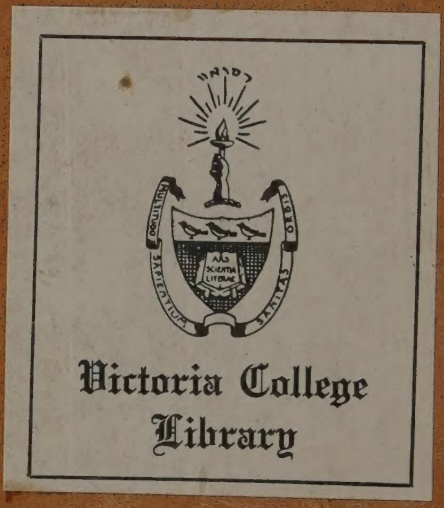
Position of foreign states
before French courts



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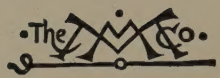

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PREFACE

THE following study on the position of foreign states before French courts was prepared under the auspices of the Bureau of International Research of Harvard University and Radcliffe College. It comprises one of a series of similar studies which will be combined to form a general treatise on the subject.

The bibliography, so far from being comprehensive, is only a list of the more important works to which reference is made —often in abbreviated form—in the text. It is further limited to French material, leaving to subsequent studies the treatment of their respective literature.

E. W. A.

Cambridge, Massachusetts,
May, 1929.

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INTRODUCTION

THE administration of justice in France is accomplished through the medium of several orders of courts. First there are the "ordinary" courts, comprising civil, penal and commercial jurisdictions; second the administrative tribunals; third special courts, such as military and maritime tribunals, and fourth the tribunal of conflicts to determine the attribution of competence as between the judicial and the administrative orders.

All three divisions of the ordinary courts are dominated by the court of cassation.

1. *Justice de Paix.* Justice of the Peace. There is one justice of the peace for each canton, save in Paris, where there are more. They are appointed and removed by the chief executive. The justice sits alone and is charged with an attempt at reconciliation of the parties in dispute before they proceed to suit. He also has civil and penal jurisdiction. In the former he hears suits concerning landlords and tenants, apprenticeships, etc., usually without appeal up to 600 francs and with appeal up to 3,000 francs. In penal matters, he sits as *juge de simple police,* for the trial of petty offenses.

2. *Tribunal de première instance.* Tribunal of First Instance. These tribunals were formerly known as *tribunaux d'arrondissement,* as there was one to each of these districts. They are composed of a varying number of judges, appointed for life, presided over by a president. They may be divided into chambers, and, in Paris, the chambers are again divided into sections. Their decisions, known as *"jugements,"* must be rendered by an uneven number of judges, but not fewer than three. In civil matters, the tribunal sits in first and last instance in certain cases involving not less than 600 francs nor more than 1500. In other litigation its judgments are subject to appeal before the Court of Appeal. It also hears

the appeals from the justices of the peace. The president may alone decide urgent cases by summary process, issuing an *ordonnance de référé.*

In penal matters, it sits as a *tribunal correctionnel,* with no final jurisdiction, appeals lying to the Court of Appeals. It hears in first resort misdemeanors having certain minor penalties attached, and, on appeal, judgments from the *tribunal de simple police.* Where no commercial tribunal has been established, the tribunal of first instance also fulfils its functions.

3. *Conseil de Prud'hommes.* Council of Laymen. These are special labor tribunals, with power to conciliate, or, failing that, to decide differences between employers and employees. These councils are set up by the President when recommended by the *Conseil d'État* upon request of the chamber of commerce or municipal council of the region affected. They consist of an equal number of representatives of capital and labor elected for a six-year term by men and women engaged as employers or employees in certain occupations. The council hears in last resort disputes involving not more than 1000 francs; for others, appeal may be taken to the civil tribunal.

4. *Tribunal de Commerce.* Commercial Tribunal. These are elective tribunals established in cities having commerce enough to warrant their existence. They are composed of a varying number of judges elected by merchants and mariners from among qualified voters of thirty years of age, and old French merchants of the district. Their term of office is for two years, one half the body being reëlected every year. They are competent to hear cases involving commercial and banking transactions, and bankruptcy. If the parties so desire they may decide finally on any of these issues, or on any claim not exceeding 1500 francs. Otherwise an appeal lies to the court of appeal.

5. *Cour d'Appel.* Court of Appeal. The number of such courts, established in the principal cities, is determined by statute. They may consist of from one to nine chambers and are composed of judges appointed for life. When all the chambers unite, the session is said to be *"solennelle."* They hear appeals in last resort from the judgment of the tribunals

of first instance and the commercial tribunals. Their conclusions are embodied in *"arrêts,"* which, as is characteristic of true appeals, may not only invalidate the previous decision, but may constitute a decision in themselves.

In penal matters, the courts of appeal perform somewhat the same duties as a grand jury (although as a grand jury in second instance, as it were). They also hear in last resort appeals from the *tribunaux correctionnels.*

6. *Cour de Cassation.* Court of Cassation. It sits at Paris and is composed of forty-five justices, a president-in-chief, and presidents of its three chambers, all appointed for life by the executive. It has no original, nor, strictly speaking, any appellate jurisdiction. It hears only *"pourvois en cassation,"* reviewing no facts, considering only claims of violation of law or procedure or the incompetence of the court which rendered the decision. If the action is successful, the decision in question is annulled, but the Court of Cassation does not itself hand down a decision. The parties are referred to another court of the same rank as that from which the unsatisfactory decision came for redetermination of the matter. This court, however, is not bound by the interpretation given by the Court of Cassation, but may decide in accord with its sister court. Should this decision be annulled for the same motives as the former, the third court must abide by the ruling of the Court of Cassation.

7. The *Conseil d'État.* This is an administrative tribunal which sits in first instance, appeal, or cassation. Its composition is prescribed by statute.

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THE POSITION OF FOREIGN STATES BEFORE FRENCH COURTS

THE POSITION OF FOREIGN STATES BEFORE FRENCH COURTS

CHAPTER I

JURISDICTION OVER FOREIGN STATES AND SOVEREIGNS

Attitude of Courts to French Government

In France the principle of the immunity of foreign states from the jurisdiction of domestic courts, and the freedom of their property from seizure has received broad application. As regards the French government, the system of administrative courts, notably the *Conseil d'État*, affords a happy method of reconciling a theoretical independence of judicial control with a practical means of seeing justice done, even when the state is the offender. This system, however, is not applied to foreign states, one reason being that such states have no similar jurisdiction to offer in return.

Competence vis-à-vis Foreign State

The efforts that have been made to bring suits against foreign governments, in derogation of the international-law principle of independence and equality, have for the most part been founded upon Article 14 of the *Code civil*, which permits suits in French courts against foreigners, even non-residents, for the enforcement of obligations contracted at home or abroad with a Frenchman. This provision was extended by the lower tribunals so as to bring foreign states within the judicial competence of the French courts, although it was recognized that even as applied to individual foreigners it constituted an exception to the general rules for determining the limits of a state's jurisdiction. On January 22, 1849, the Court of Cassation definitely settled this point, holding that the article in question was not applicable to a foreign *state*, which could not be subjected against its will to the jurisdiction of French courts.

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Decisions of Lower Courts Prior to 1849

Before this decision by the Court of Cassation, several judgments had been rendered to the same effect by inferior tribunals. Significant is that of the Civil Tribunal of Havre handed down May 25, 1827, in a suit brought against the Government of Haiti.[1] One Blanchet, a French citizen, had a claim in connection with some work he had done on the draft Constitution of the Republic of Haiti. In denying him the right to satisfy his claim by seizing property of Haiti in France, the court pointed out that the right to exercise jurisdiction, one of the attributes of sovereignty, was normally limited to one's own nationals. Nevertheless, a foreigner might be prosecuted for criminal acts committed in the country of the court, or civilly in regard to contracts made with a French subject in France. For non-resident foreigners the rule was that they were not to be summoned before domestic courts in connection with contracts made abroad, even with a national of the country of the court. To this general principle, Article 14 of the French Civil Code formed an exception. It was inserted to afford an additional protection to French citizens. When the sovereign was concerned with one of his own citizens, in a matter not involving his sovereign character, it was conformable to that love of justice which Vattel said ought particularly to inspire a sovereign, that the litigation be resolved by the tribunals of the state. But this was entirely different from the case where a foreign sovereign was concerned. One sovereign could not be subjected to the jurisdiction of another, for jurisdiction was an emanation of authority. Under such circumstances the principle of the independence of nations required that equal deal with equal by diplomatic means. It was useless to attempt to apply Article 14 of the Civil Code to cover such a case by analogy, for the article in question, being in derogation of the common-law principle, must be strictly interpreted. There was internal evidence, too, that the article was intended to apply only to individual foreigners. It would constitute an affront to the dignity and independence of a foreign sovereign to compel him to submit to the jurisdiction of a French court. Hence, in the present instance, if the plaintiff had a claim

Article 14 of Civil Code not Applicable to Foreign State

[1] Dalloz, 1849-1-6, note; Sirey, 1849-1-83, note.

against Haiti, he had no recourse to the courts of France; he must either ask the intervention of the King, or submit to the jurisdiction of the courts of Haiti. Such being the case, it was not material to enquire whether the property whose attachment was demanded was or was not liable to seizure.

In a similar decision of May 2, 1828,[1] the Tribunal of the Seine adverted to further evidence that the scope of Article 14 was limited to engagements contracted by individuals. It was implicitly recognized in the preliminary discussions before the *Conseil d'État,* where it was admitted that the provision in question did not apply to foreign ambassadors, resident in France. If, the court reasoned, ambassadors were not subject to the jurisdiction of the country wherein they resided, so much the more must the governments from whom these representatives derived their authority be immune.[2]

Foreign State not Liable to Suit on a Contract

On April 16, 1847, the Civil Tribunal of the Seine rendered a decision in the case of Solon *v.* The Egyptian Government.[3] Appointed by the Pasha of Egypt to found a school of public administration in Egypt, the plaintiff claimed that the contract had been broken, and brought suit against the Egyptian Government for damages. This claim had been allowed by the lower court. On appeal by the viceroy, the Tribunal held that there was no local jurisdiction over foreign governments except when the action involved real property possessed by them in France. To assume jurisdiction in the present case would involve an examination of an administrative and governmental act of a foreign government, for which the French court was without competence.

Spanish Government v. Cassaux

Finally, on January 22, 1849, the Court of Cassation affirmed these decisions in principle, and gave its interpretation of Article 14 of the *Code civil:* it could not be relied upon to extend the jurisdiction of French courts over the public acts of a foreign government.[4] The case arose out of a con-

[1] Dalloz, 1849-1-6, note; Sirey, 1849-1-85, note; *Gazette des Tribunaux,* May 3, 1828.

[2] See also judgment of Tribunal of the Seine, July 11, 1840; Sirey, 1849-1-86, note.

[3] Dalloz, 1849-1-7, note; *Journal du Palais,* 1849-1-172, note; *Gazette des Tribunaux,* April 17, 1847.

[4] Dalloz, 1849-1-5; *Journal du Palais,* 1849-1-166; Sirey, 1849-1-81.

tract for the supply of shoes by certain Bayonne merchants to the Spanish Government. The payment of a draft drawn by the Minister of the Military Treasury of Spain in favor of the plaintiff was refused. Hereupon the plaintiff garnisheed all debts of a certain merchant at Bayonne admitted to be owing to the Spanish Government. On March 7, 1844, the Minister of Finance, representing Spain, was cited before the Civil Tribunal of Bayonne. In a judgment of July 30, 1844, the attachment was declared valid, and the garnishee was ordered to deliver to the plaintiff funds owing to Spain up to a certain specified amount. This decision was affirmed May 6, 1845, by the Court of Appeal of Pau, on the ground that there could be no doubt of the genuineness of the debt, that the sovereignty of Spain was not involved, and that since the execution was to take place in France there could be no embarrassment on that score.[1]

Garnishment of Foreign Government Property Held Valid

The case was taken before the Court of Cassation on the plea of violation of the principle of the independence of sovereign states and the false application of Article 14 of the *Code civil*. The decision appealed from was said to be summed up in the statement that the sovereignty and independence of Spain were not involved in the issue. Was that true? Did not the case rather turn on this very point, and was not this great principle openly violated? If a state were subject to the jurisdiction of another state, was it independent, as the law of nations stipulated? Jurisdiction was one of the principal attributes of sovereignty—*jurisdictio inhaeret, cohaeret, adhaeret imperio*. The appellants further argued that Article 14 of the Civil Code was the only text of French law by which foreigners were made subject to French jurisdiction, and that this article did not apply to foreign states. How could France, in codifying its own law, have arrogated to itself a right of jurisdiction over its own peers, who owed it no obedience? From the legislative discussion of this article, it was obvious that no such intention existed. The original draft of the Code contained an article to the effect that foreigners, clothed with diplomatic character in the quality of ambassadors, ministers, or whatever the denomination might be, were not subjected to

Argument of Appellants

[1] Dalloz, 1849-1-7; Sirey, 1849-1-87.

the civil laws of the nation within which they resided in this character. They could not be summoned before French tribunals either in civil or criminal matters. This provision was thrown out by the *Conseil d'État* as foreign to civil law.[1] Later, Monsieur Portalis, speaking on the amended bill, said, "We do not mention ambassadors; what concerns them is regulated by international law." If, instead of ambassadors or ministers, the state itself were involved, there was all the more reason why the law of nations should alone be applicable. The extraterritoriality of ambassadors being derived from their representative character, it would be absurd not to grant it to the state itself. Moreover, a state was sovereign on condition that it respect the sovereignty of other states. A foreign state was not subject to the civil laws of France except in regard to real property which it might possess in France. This single exception to the general rule was recognized both by Blackstone and by Article 3 of the *Code civil*.

If Spain could be cited before French tribunals on any other score, it would take its revenge by not executing the judgment. And what was a judgment without means of execution? It had been contended that in the present case, this difficulty would not be encountered, since the execution could be made in France, but it was the principle of execution which had to be considered. The tribunals had begun by declaring Spain a debtor, and condemning it to an attachment, without even knowing whether the property to be attached sufficed to cover the debt, or whether the balance would have to be obtained by the levy of an execution upon property in Spain. The real point was whether a French tribunal could decide on a question regulated by foreign administrative or constitutional law, such as the payment of a bill of exchange issued by an official of a foreign government. Were this competence admitted, what would become of the independence of a state thus made subject to another? It was an incontestable principle that the property of a foreign state was not subject to seizure.

[1] *Projet de Code Civil presenté par la Commission nominée par le Gouvernement le 24 Thermidor an 8*, page 7 (white), page 13 (green); *Recueil des Discours du Code Civil*, II, 20.

Decision

The court held that the reciprocal independence of states was one of the most universally recognized principles of international law; that no government could be subjected against its will to the jurisdiction of a foreign state, since the right of jurisdiction was inherent in its sovereignty. Because

Article 14 of Civil Code not Applicable

Article 14 of the Civil Code authorized summoning foreigners before French tribunals under certain circumstances, it by no means followed that foreign *states* were subject to similar jurisdiction as the result of engagements entered into by them with

Renunciation of Jurisdiction by Act of Contracting

Frenchmen. Moreover, whenever an individual dealt with a state, by the very fact of entering into a contract, that individual submitted to the laws and to the judicial or administrative jurisdiction of that state. Hence, the matter of verification, liquidation, or seizure of the credits of a government in the hands of nationals or foreigners could only be settled

Commercial Instrument as Evidence of Title

according to the law of that state. In the present case, it was of no importance that the evidence of title to the money claimed by the appellee—a bill of exchange—was an instrument of commerce. The form of the evidence did not alter the fact that to obtain payment of a debt contracted by a foreign government with a Frenchman, an attachment had been made in France of funds in the hands of a debtor of that government. Therefore, the rules of international law did not cease to apply. The lower court, in permitting the garnishment, violated the principle of the law of nations which consecrated the independence of states, exceeded its powers, and falsely applied Article 14 of the Civil Code. Hence the Court of Cassation reversed this judgment.

Criticism

This decision of the Court of Cassation was violently criticised in many quarters.[1] Demangeat [2] went so far as to say that the statements made by the court were mere assertions, no one of which could resist an attentive examination by an unprejudiced legal mind. Such a study he then proceeded to make. As for the motive of immunity based on reciprocal

[1] *Cf.* Conférence des Avocats de Paris, December 27, 1858, *"Les tribunaux français peuvent-ils valider la saisie-arrêt formée, en France, par un Français, sur des fonds appartenant à un gouvernement étranger?"* (Revue Pratique, VII [1859], pp. 182-186.)

[2] *Revue Pratique,* I (1856), pp. 385-397; note on Foelix's Treatise on Private International Law, fourth edition, I, 419.

independence, Demangeat said this only held of a state acting in its sovereign capacity. Proof of the fact that a foreign state's independence was not necessarily sacrificed by a suit before a French court, he thought to find by reference to certain recognized exceptions to the general rules. The argument that Article 14 of the Napoleonic Code applied only to individuals seemed equally inconclusive, since other provisions of the Code placed in the book on *Persons* and concerning their *Civil Rights* were applied to the French state. The argument that an individual submitted *ipso facto* to the jurisdiction of a foreign state by contracting with it appeared to him beneath comment. Demangeat summarized his disapproval by asking why, since the courts were competent to take cognizance of suits between the French Government and an individual, foreign governments should enjoy a privilege which the French legislator (Napoleon) had been unwilling to accord to the French Government? [1]

Despite the criticism evoked by this decision, subsequent judgments rendered by the courts of France have followed closely in the lines here laid down. When a foreign state is the defendant the courts have not distinguished between its sovereign and civil capacities, but have declared themselves equally incompetent to review the acts of foreign military authorities, or a contract with a trucking concern for the removal of a state exhibit at an international exposition. When foreign sovereigns are concerned, however, the difference between their official and private acts have been taken into consideration, with the result that competence, denied in the one case, has been admitted in the other.

Suits Against Foreign Sovereigns

The decision of the Court of Appeal of Paris, rendered on August 23, 1870, is illustrative.[2] A French citizen with a commercial establishment in Russia had suffered alleged illegal arrest at the hands of the Russian police on Russian territory. She brought suit for damages against the French Minister of Foreign Affairs and the Tsar of Russia. The tribunal of first instance had rendered a judgment in default against the Russian Government in the person of the Tsar.

[1] *Cf.* also criticism by Royer in Dalloz, 1867-2-49, note.

[2] Dalloz, 1871-2-9; Sirey, 1871-2-6; *Journal du Palais*, 1871, 73.

Public Acts

In reversing this decision the court said that the reciprocal independence of states was consecrated by international law; that each state was sovereign within its borders and there administered justice, one of the attributes of sovereignty, through its courts, which were invested with jurisdiction and the power to enforce their decisions. It followed that one could not cite a foreign sovereign before one's courts, any more than the diplomatic representative of the state. To do so would be a violation of international law. Nor was it contemplated by Article 14 of the Napoleonic Code. This provision referred only to private individuals, not to foreign sovereigns or states. The incompetence of the court was held to be a matter of public policy, which it was the duty of the attorney-general to defend.

The distinction to be drawn, in case of suits brought against foreign sovereigns, between the sovereign acting as the head of the state and in a personal capacity, is well illustrated by two cases decided in the spring of 1872. The first was one brought against the heirs of Emperor Maximilian of Mexico.[1] This was a suit brought to recover the amount of a bill due for the supply of decorations manufactured by the plaintiff for the government of Maximilian, Emperor of Mexico. These decorations were to be bestowed on those upon whom an Order was conferred as a reward for public service. Under these circumstances it was held on appeal that an order for such decorations on the part of the sovereign was a public administrative act, and that French courts were not competent to consider contracts made by a foreign sovereign acting as chief of state in the exercise of *puissance publique*.

Personal Acts

This decision is to be contrasted with that in a suit against Isabelle de Bourbon, ex-queen of Spain, for a debt contracted by her in part while she was still reigning and in part after her deposition by revolution.[2] The action was brought by a firm of jewellers in Paris for payment for several gems ordered at various times by the defendant. The court held that to

[1] Court of Appeal, Paris, March 15, 1872, Dalloz, 1873-2-24; Sirey, 1872-2-68; *Journal du Palais*, 1872, 350.

[2] Court of Appeal, Paris, June 3, 1872, Dalloz, 1872-2-124; Sirey, 1872-2-293; *Journal du Palais*, 1872, 1185.

justify her exception to the competence of the court, the defendant would have to prove that she had purchased the diamonds in her sovereign capacity for the account of the Spanish treasury. That such was not the case was sufficiently evidenced by the facts. The jewels were actually furnished for her personal use and as wedding presents for her daughter. Inasmuch as some of the gems were delivered after the revolution, it would be impossible to maintain that they were items on the civil list of Spain. Finally, the Spanish treasury was known to possess no crown jewels. Hence the contract was concerned only with private interests of the Crown, and as such was regulated not by international law, but by the rules of French civil law. Applying Article 14 of the Civil Code, the plaintiffs were entitled to have this action heard before a French court, and the court was competent to take cognizance of the case.

A similar case was that of a suit brought against the ex-sultan of Zanzibar for the payment of a bill for medical services. It is not made clear in the report whether the services were rendered at a time when the defendant was still a prince or at a subsequent date. The court, however, in determining its own competence to hear the suit, said that if, despite the generality of the terms of Article 14 of the *Code civil*, the principle of the reciprocal independence of states excluded the possibility of French tribunals assuming jurisdiction in regard to foreign sovereigns, that exception did not include a case like the one in hand, where the sovereign had acted in his own personal interests.[1]

Jurisdiction over Foreign States

In regard to foreign states, however, although the courts might base the immunity they granted on grounds of the public character of the act under review, no such fundamental distinction was drawn as in the case of sovereigns. Whether the question involved a governmental activity or a purely civil relationship, the immunity of the state was equally secure. When the Swiss Government was sued in connection with a contract to charter certain vessels for the transportation of

[1] Civil Tribunal of the Seine, July 25, 1916, *Journal du Droit International,* XLIV (1917), p. 1465; *Revue de Droit International Privé,* XV (1919), p. 505.

cocoa in the interests of the Swiss chocolate industry, the tribunal of first instance applied the Belgian doctrine that sovereign states enjoyed immunity from the jurisdiction of foreign courts only so long as they engaged in sovereign acts.[1] It held that in the case before it, the agreement involved was a purely commercial one. As regarded foreign states, it was admitted that the issue was new, in that, prior to the World War, it was not the custom for them to engage in commercial enterprises. On the other hand, it was recognized that the ordinary courts were competent to review all cases arising between individuals and the French state acting as charterer, insurer or transporter by rail. Applying this principle, it was held that the Swiss Government had specifically renounced its immunity in making this charter-party. On appeal [2] this was held not to constitute a commercial venture, but to have been an undertaking in the interests of national provisioning, which the French courts were not competent to review.

Operations of Swiss Bureau of Transports

Participation in International Exposition

A case in which no distinction was recognized between sovereign and civil acts of the state so far as immunity was concerned was that decided on April 30, 1912, by the Court of Appeal at Paris affirming a decision of the Tribunal of the Seine.[3] The Russian State Railway had exhibited some railway carriages at the Universal Exposition of 1900 in Paris. As they were being sent back, the conveyance containing one of these carriages hit a street lamp, which, in falling, severely injured a French gentleman. He brought suit against the transportation company and against the Russian Railway, obtaining a judgment of 2,000 francs plus a life pension. The transportation company proved to be insolvent, and the Russian Railway refused to pay the damages. The plaintiff thereupon brought suit against the Russian Government.

The court, in denying its competence to entertain the action,

[1] December 26, 1919, *Gazette du Palais,* 1920-2-382; *Revue de Droit International Privé,* XVII (1921), 70.

[2] Court of Appeal, Paris, March 16, 1921, *Revue Internationale du Droit Maritime,* XXXIII (1922), p. 763; *Journal du Droit International,* XLVIII (1921), p. 179.

[3] Dalloz, 1913-2-201, *Revue de Droit International Privé,* XV (1919), p. 493.

said that whereas the fact that a state took official part in an exposition in a foreign country constituted a governmental act, which could never give rise to a civil liability, the same could not be said of agreements made by a state with contractors for undertakings incidental to its exhibits. Such arrangements were no doubt simple acts of public administration, which would render it civilly liable to a national or a foreigner, as responsible for the torts of its agents. Nevertheless, the principles of sovereignty and independence were opposed to the idea of having a state subjected against its will to the judicial authorities of another country. In the case of a state there was no room for the recognition of the distinction commonly made for sovereigns—to wit, that between a public personality which escaped the competence of foreign courts, and a moral personality which was subjected to it. The reason for this was that all the acts of a state could have but one end and aim, which was always a political one. Its unity did not admit of the conception of a dual personality. As the state could, therefore, not be assimilated to an individual, and as Article 14 of the Civil Code upon which reliance was had applied only to such, the court was not competent.

German Government Agents in Alsace-Lorraine

An interesting case that arose on the morrow of the Franco-Prussian war, which may not have been devoid of political considerations, was that decided by the Court of Appeal of Nancy on August 31, 1871.[1] By the Treaty of Frankfurt, May 10, 1871 (Art. 2), French subjects domiciled in the ceded provinces of Alsace and Lorraine were to retain their French nationality until October 1, 1872. Previous to the expiration of this time, such a French subject brought suit in the tribunal at Nancy against an agent of the German Government in Alsace-Lorraine in connection with a sale consummated between the two parties in France. An attempt was made to apply Article 14 of the Civil Code, but the court held that it was not competent to consider the matter. The German officials represented the German state, which could not be compelled to appear before a French court without compromising the great principles of sovereignty and mutual inde-

[1] Dalloz, 1871-2-207; Sirey, 1871-2-129; *Journal du Palais*, 1871, 485.

pendence. This doctrine had been consecrated by the law of nations, taught by all publicists, and followed in judicial practice. It was, moreover, implicitly admitted by the *Conseil d'État* in its session of the 6 *Thermidor an* ix to the profit of ambassadors, ministers and their suites. Such an immunity accorded to its envoys appertained *a fortiori* to the state which accredited them and from which their powers were derived. Article 14 could not be extended to such a case, and French courts were incompetent to take cognizance of it.

Claim for Wages of State Agent

Similarly, the courts declared themselves incompetent to hear the suit of a French engineer brought against the Bey of Tunis for payment of some 4,500,000 francs, alleged to be due him in connection with work he had been charged to execute for the restoration of the aqueducts of Carthage.[1] A foreign government could not be subjected to the jurisdiction of national courts for the engagements to which it was a party.

Situation of Coöperating Armies in France

Certain cases which arose during the World War were of more than usual interest due to the peculiar situation of the allied armies on French soil. Troops from Great Britain, the United States, Belgium, Servia, Poland, Czechoslovakia, Portugal and Russia were operating in France, and, in addition, the seat of the Belgian Government was transferred to France. The right of requisition, essential to the well-being of armies in the field, was early accorded by the French authorities to the allied forces. In some cases, requisition was effected by the French for the benefit of the army in question; in some cases the right was given directly to the foreign army; in others, one foreign army was responsible for making requisitions for another.[2] It was inevitable that the exercise of this right should involve the foreign armies and the inhabitants in disagreements which were theoretically without means of solution, since the rules governing military requisitions in France, which were carefully laid down in the *Loi Relative aux Réquisitions Militaires* of July 3, 1877,[3] provided for suits against the military authorities in the ordinary courts where the

[1] Tribunal of the Seine, May 1, 1867; Dalloz, 1867-2-49, note.
[2] Chalufour, *Statut Juridique des Troupes Alliées*, pp. 4, 5.
[3] *Bulletin des Lois*, No. 346, 1877, II, p. 1.

indemnities proposed were not satisfactory to the inhabitants.[1] Such suits could of course not be brought against foreign armies, as that would be tantamount to suing the foreign state. To obviate this difficulty, definite arrangements were made with Great Britain and the United States, to the effect that where the inhabitants were not satisfied with the indemnity proposed by the military authorities, suit was to be brought against the *French* Government in accordance with the provisions of the law of July 3, 1877.

British Forces

The first arrangement to be made was with the British authorities. A conference was held in Paris, March 19-20, 1915, which resulted in a draft project to the effect that the French Government should be substituted for the British in litigation arising from requisitions. The former was to proceed in its own name before the courts. If the decision was subject to appeal by the government, the British authorities were to be informed and their conclusion was final as to whether the judgment should be paid or an appeal taken. Copies of all final judgments were to be sent the British authorities, who were to repay the French Government the amounts it had advanced. The French state alone appeared before the courts as defendant.[2]

On December 18, 1915, an agreement was concluded between the French and British Governments providing for the complete substitution of the French Government for the British in all litigation, not only that resulting from requisitions, but in tort actions involving the responsibility of the British Government. The text is as follows: [3]

Les deux gouvernements français et anglais, ayant voulu régler la procédure à suivre en cas de désaccord sur le montant des indemnités à attribuer à la suite des dommages causés par l'armée anglaise pendant son séjour en France, le projet d'accord suivant a été établi:

1. Dans le cas de réquisitions faites par les autorités militaires britanniques en France ou de torts ou de dommages causés par l'armée britannique à des personnes ou à des biens

[1] Article 26.

[2] *Archives du Service Historique du Ministère de la Guerre*, M. 505, quoted in Chalufour, *Statut Juridique des Troupes Alliées*, p. 19.

[3] Ibid.

et qui, s'étant produits dans des circonstances dûment constatées, engagent la responsabilité du gouvernement britannique, si le plaignant, après s'être adressé à la Commission britannique des réclamations, n'est pas satisfait de l'indemnité accordée, on appliquera la procédure suivante:

2. Le plaignant pourra intenter une action devant les tribunaux contre le gouvernement français comme si au lieu de l'armée britannique, il s'agissait de l'armée française.

3. Les autorités militaires britanniques fourniront aux autorités militaires françaises tous renseignements et documents leur permettant de traiter l'affaire.

4. Le gouvernement français traitera l'affaire sous sa propre responsabilité de telle façon qui lui conviendra.

5. Après la guerre, le gouvernement français pourra réclamer au gouvernement britannique les frais causés par les satisfactions accordées à ces réclamations, et toute l'affaire sera arrangée par voie diplomatique.

A ministerial circular of February 15, 1916, stipulated that the tribunal in which the action was to be brought against the French Government should be the appropriate judicial court in the case of requisitions, and the *Conseil d'État* in the case of tort actions. It further provided that the decision of the British authorities as to the existence of their liability was final. It was only where the amount of indemnity due was in dispute that the matter could be litigated before the courts. This latter provision was obviously at variance with the terms of Article 1 of the agreement of December 18, 1915, which referred to injuries to persons or property, which, "having occurred under circumstances duly certified to, involve the liability of the British Government." In other words, it had not been agreed that the existence of the liability was to be determined by British law. The implication was rather that French laws were to provide the criterion for the vesting of responsibility, and, for the determination of this question, French courts, not British military authorities, were competent. Foremost among those to point out the discrepancies between the text of the agreement and that of the circular were the advocates of Boulogne-sur-Mer where many of the suits brought indirectly against the British Government were heard. The result was that

the offending article was revoked by a circular of July 1, 1916.[1]

Decisions

The amount of actual litigation reported is surprisingly small. A decision of the *Conseil d'État,* of December 1, 1922,[2] illustrates the procedure. A Frenchman, injured by a British army motorcyclist in 1918, brought suit against the French Minister of War. It was established that the plaintiff had been guilty of contributory negligence, and the British Claims Commission had refused to admit any liability. Under the terms of the Circular of February 15, 1916, this refusal would have been conclusive, the existence of the liability being determined in accordance with English law. Under the terms of the agreement of December 18, 1915, however, this refusal to recognize even the principle of liability was subject to review by the courts, in this instance, the *Conseil d'État.* The court decided in conformity with French law that the British Government, being partly to blame, would be liable in a certain sum. Judgment was accordingly rendered against the French Minister of War for that amount.

Another case of a tort action brought against the French Ministry of War, substituted for the British Government, was that decided by the *Conseil d'État* May 16, 1924.[3] A claim for damages for an injury caused by a British army automobile had been referred to the French Minister of War and rejected. The state was condemned by the *Conseil d'État* to pay the damages asked, despite the fact that in a criminal action brought against the driver of the automobile, the *Tribunal correctionel* had awarded damages to the present plaintiff which he had been unable to collect on account of the insolvency of the individual.[4]

[1] Chalufour, *Statut Juridique des Troupes Alliées,* p. 23. See also, Henry, *Requisitions exercées par les armées alliées. (Revue du Droit International Privé,* XIV [1918], pp. 44-61.)

[2] Recueil des Arrêts du Conseil d'État, XCII (1922), 896.

[3] *Ibid,* XCIV (1924), p. 480.

[4] The competence of criminal courts to deal with the civil aspects of a case before them on the criminal issue and so to award damages to the injured party is accorded by article 3 of the *Code d'Instruction Criminelle. Cf.* power of equity courts to award money damages.

American Forces

A United States statute of April 18, 1918, entitled "An act to give indemnity for damages caused by American forces abroad," provided that claims of inhabitants of France for damages caused by American military forces should not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occurred.[1] In other words, requisitions by the American Expeditionary Forces in France were subject to the French law of July 3, 1877, with its provision for suit against the requisitioning government. The question of negotiating a convention between the French and American Governments providing that in the litigious cases the French state would appear before French tribunals in place of the American Government, the latter undertaking to refund to France the successive indemnities, was broached by the French Government as early as March, 1918. The United States was not persuaded that such an agreement was necessary. To a subsequent proposal on the part of France for the entry into certain conventions, among others one regarding appeals in the matter of requisition by the American troops in France, the American Government, under date of February 15, 1919, informed the French Government as follows:

> With reference to the convention proposed for the settlement of claims arising out of damage that may be caused by the American troops in France, the authorities of this Government point out that, under the legislation that has been passed by Congress, especially the Act approved April 18, 1918, . . . officers of the Army . . . are authorized to consider, adjust, and pay claims of this class within certain limits, and that until it appears that the favorable results expected of the legislation that has been passed are not realized, the execution of such a convention would be inadvisable.
>
> . . . . . .
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> In coming to the conclusion that the execution of these proposed conventions is inadvisable and unnecessary, the authorities of this Government point out the well-known principle of international law that a sovereign State may not be sued in the courts of any other sovereign State, but that any claims against such State may be prosecuted before the courts of that State in such manner as it may deem advisable to spec-

[1] United States Statutes at Large, XL, Pt. 1, p. 532.

ify, and that the proposed agreements would authorize individuals and others to bring suit against this Government in the courts of the French Republic. . . .

Parker-Ignace Agreement

It was not until December 1, 1919, that an arrangement—known as the Parker-Ignace agreement—was entered into between the United States and France, whereby France was to substitute itself for America in reference to all unsettled claims and also those concerning which offers of settlement had not been accepted, arising or accruing during the "war period," *i.e.* between the 6th day of April, 1917, and the 31st day of December, 1919. Claims arising under the Act of April 18, 1918, were specifically mentioned.[1] This agreement was frequently referred to by the courts in suits against the French Minister of War in the matter of requisitions by the American forces. In a decision of February 27, 1924,[2] the *Conseil d'État* relied upon it in condemning the French state to indemnify the widow of a man killed by accident by a motorcyclist of the American Army. The suit was brought against the French Minister of War. On May 2, 1924, the *Conseil d'État* dismissed a suit similarly brought on the ground that the liability of the French state was not involved by the wanton killing of a youth in his father's house by a corporal of the American military police. This crime was considered to involve the personal liability of the corporal, both according to French and American legal principles.[3]

Status of Belgian Government in France

Not only the presence of the coöperating armies on French soil, but that of the Belgian Government as well, gave rise to unusual legal issues. The seat of the Belgian Government was in France, yet the general rules of immunity from suit were held to apply to it. On April 13, 1915, the Civil Tribunal at Havre [4] held that the members of the Belgian Government in residence in Havre enjoyed extraterritoriality, and in consequence were deemed to retain not only their nationality but the residence which they had had before leaving their own

[1] Final Report of United States Liquidation Commission, War Department, p. 179.

[2] Recueil des Arrêts du Conseil d'État, XCIV (1924), 228.

[3] *Ibid,* XCIV (1924), 437.

[4] Dalloz, 1915-5-3; *Gazette des Tribunaux,* May 1, 1915.

country, and that no matter how long their absence. The Belgian cabinet officers resident in France, being inviolable, could not be subjected to any act of the judicial authority of France. No writ could be served upon them, unless they voluntarily received the warrant officer. They were subject only to the jurisdiction of their own courts. However, this immunity, which was the same as that enjoyed by Belgian diplomatic representatives in Paris, might be tacitly renounced. It was so renounced when the Minister in question gave the official charged with making the attachment all the necessary information to enable him to serve the writ. If the immunity had thus been waived, the place of residence of the Belgian Government was to be considered as Havre.[1]

The Civil Tribunal at Saint-Malo in a summary judgment of July 4, 1917, declared itself incompetent in a suit brought against the Belgian Government by some French women with whom the latter had contracted for the maintenance of Belgian soldiers at Saint-Malo. They claimed that their property had been damaged by acts of the soldiers.[2]

Suits Resulting from Foreign Loans

Participation in the loans of foreign governments or issues guaranteed by them has been the foundation of many suits brought in French courts. When the actions in such cases are brought against agents of the foreign governments, it becomes necessary to determine whether the banks have been acting in their personal capacities or within the scope of the authority delegated them by their principals. In 1867, holders of certain obligations of the Cavour Canal Company brought suit against the Italian Government.[3] They invoked the guarantee made by the Government in reliance upon which they had done business with the company which was now defaulting. The court declared itself incompetent, without adducing further

Suit v. Foreign Government

[1] See also the decision of the *Tribunal correctionnel* at Havre, November 15, 1915, to the effect that the French law prohibiting trading with the enemy was violated within French jurisdiction by the act of sending merchandise to a Hungarian in Switzerland from a window in a French post-office reserved to the use of the Belgian mail service, which service was effected by means of Belgian postage stamps. (*Journal du Droit International,* XLIII [1916], 164.)

[2] *Journal du Droit International,* XLVI (1919), 749.

[3] Commercial Tribunal of the Seine, April 11, 1867, Dalloz, 1867-2-49, note.

reasons than the decision of the Court of Cassation in the Spanish-Government case of nearly twenty years before.[1] This unusual application by a French court of the principle of *stare decisis* gave rise to certain adverse comment. It was questioned whether such an unmotivated judgment of a court of first instance, relying solely on "an isolated decision of the supreme court," did not constitute "a renunciation of the power placed by law in its hands." [2]

Suit v. Agent of Foreign Government

On April 21, 1886, the Court of Cassation determined a case involving a loan not merely guaranteed, but issued by a foreign government.[3] Suit was brought against several banks that had negotiated a loan for the Republic of Honduras. The bonds had become worthless, and the plaintiffs sued for the purchase price, alleging fraud. The Court of Appeal on February 26, 1880, handed down a judgment to the effect that the basis of the suit was a state loan, emitted in the name and to the account of the Republic of Honduras. The banks, named as agents of the Honduran Government, constituted a committee of surveillance. For acts undertaken in this capacity, they could not be subjected to the jurisdiction of national courts, any more than the government for which they were acting. The court rejected the contention that they had contracted any personal engagements toward the plaintiff. If the prospectus of the loan aimed to deceive, the fraud was a governmental act of an official agent of the Republic of Honduras. For the review of such an act, French courts were not competent. The Court of Cassation affirmed this decision.

Under slightly different circumstances, in connection with two loans emitted by Peru in 1870 and 1872, the courts of France were held to be competent.[4] Here suit was brought by holders of the bonds against Dreyfus Brothers who had floated the loan. The claim was that the bankers were liable on personal engagements entered into with the plaintiffs. The defendants excepted to the jurisdiction of the French courts. The Court of Appeal at Paris decided June 25, 1877, that the

[1] January 22, 1849, Dalloz, 1849-1-5, and *supra*, p. 3.

[2] See note of Royer on decision above, Dalloz, 1867-2-49, note.

[3] Dalloz, 1886-1-393.

[4] Court of Cassation, August 14, 1878, Dalloz, 1879-1-57; Sirey, 1878-1-345; *Journal du Palais*, 1878, 878.

Peruvian Government was not a party to the suit which was against Dreyfus Brothers in their personal capacity, and that the mere fact that condemnation of the latter in this suit might give them recourse against the Peruvian Government, would not suffice to prevent the court from taking jurisdiction over the case. On the facts, the bankers were held to have entered into no personal engagements with the plaintiffs, but to have acted throughout as agents of Peru. This decision was upheld by the Court of Cassation.

Submission to Jurisdiction by Foreign States

Where the foreign government has itself submitted to the jurisdiction of French courts, such submission is held to be irrevocable as regards that issue. Moreover, the submission of one phase of a difficulty to settlement in France has been held to include a willingness to subject another phase of the same affair to settlement by an entirely different process. The finality of the attribution of jurisdiction is well brought out in a suit involving the Government of Tunis. Certain Tunisian bonds had been issued through French banks under an agreement that all disputes arising in connection therewith should be settled according to French law by the French tribunals of the department of the Seine, to which the parties agreed to grant jurisdiction for this purpose. Subsequently, the Bey established a special commission for the management and control of his financial affairs. In a case brought against the Government of Tunis, in connection with these bonds, the Civil Tribunal of the Seine held [1] that the establishment of the Commission could not serve to withdraw the case from the jurisdiction of the French courts in favor of that of the Commission. Moreover, there was nothing to indicate that the Commission was invested with judicial powers. Nor did the fact that the plaintiff had permitted the Commission to list his holdings amount to a renunciation on his part of the jurisdiction of French courts. Having once submitted to its jurisdiction, that jurisdiction remained obligatory upon both parties.

Effect of Submission to Arbitration

The courts went even further, however, and decided that submission of an issue to a French arbitrator implied submission to the judiciary of all questions connected with the

[1] April 10, 1888, *Journal du Droit International Privé*, XV (1888), 670.

execution of the award. On June 30, 1891, the Civil Tribunal of the Seine decided a case brought by the heirs of Ben Aïad against the Bey of Tunis and the Tunisian Government for the payment of sums granted him by an arbitral award of Napoleon III on November 30, 1856.[1] In declaring its competence, the court said that although one government could not be subjected to the jurisdiction of another, this principle gave way before a definite acceptance by that government of a jurisdiction foreign to it. When the Bey of Tunis, upon the occasion of certain difficulties with General Ben Aïad, asked Napoleon III to arbitrate the issue, he thereby accepted all the consequences, and renounced the privilege of invoking the immunities attached to his sovereignty in all that concerned the arbitration or the ensuing execution of the award.

Foreign State as Plaintiff

The French courts permit a foreign state to bring suit before them, but such a plaintiff is not entitled to the benefits of the laws of France if it has bound itself by a contrary agreement. On the other hand, the defendant may claim such protection, to the extent of having costs decreed against the state or requiring security to be given. According to the French rule, a judicial decision is the prerequisite of any liquidation of collateral. In making a contract with a French bank, the Ottoman Government stipulated certain conditions under which collateral put up by it might be liquidated. No mention was made of any judicial process, however. When, therefore, the Ottoman Government brought suit against the bank to have this rule of French law enforced in its own favor, in derogation of the conditions it had itself stipulated, the court refused to grant its request. It held that as the bank had acted in accordance with the agreement, and the agreement was not contrary to public policy, it should be enforced in France, although it was not in consonance with French law.[2]

Claim to Benefit of French Law

Condemnation of Foreign State in Costs

In a suit brought April 13, 1867, before the Court of Appeal at Paris by the Spanish Government to recover certain sums from the widow of one of its former employees, the court, after

[1] *Journal du Droit International Privé*, XIX (1892), 952.

[2] Civil Tribunal of the Seine, March 3, 1875; Sirey, 1877-2-25.

holding that the statute of limitations had run as regarded this claim, condemned the plaintiff state in costs.[1]

Security Required of Foreign State

Similarly, when the agent of a foreign state appeared as plaintiff, the usual security was required. In the case of the *Western Wave,* the captain of this United States Shipping Board vessel brought suit against the Paris-Lyons-Midi Railroad Company.[2] The defendants, in accordance with their rights under the civil code, demanded security for costs. The plaintiff maintained that the Shipping Board, as an integral part of the United States Government, could not be subjected to any such requirement. The court held, however, that inasmuch as the code required security from all foreign plaintiffs, a treaty alone could protect a foreign state from a like necessity. Not only was there none in this instance, but it was pointed out that a court of appeals in the United States had once held that the Republic of Honduras was bound to give security when it appeared as a plaintiff.[3] The ordinary immunities were not recognized as applicable to the case, and the security was ordered to be provided.

Generally speaking, the foreign sovereign state may maintain a position of immunity from process before French courts under almost any circumstances. It matters not whether it acts in a private or a public capacity, whether it is taking part in an exposition or raising funds for state purposes. Let it once admit the jurisdiction of the local courts, however, and its submission will be interpreted strictly in favor of the other party. So, too, if it elect to prosecute a suit, it may be precluded from enjoying all the advantages of French law, while being held strictly to the requirements beneficial to the defendant.

[1] Dalloz, 1867-2-49.

[2] Commercial Tribunal of Marseilles, January 11, 1921; *Revue Internationale du Droit Maritime,* XXXIII (1922), 98.

[3] The reference is apparently to *Republic of Honduras* v. *Soto,* decided by the New York Court of Appeals, January 29, 1888, 112 N. Y., 310.

CHAPTER II

THE COURTS AND FOREIGN STATE-OWNED PROPERTY

In France, there being no suits *in rem*, suits arising from the use of government-owned property may be assimilated to other suits against foreign states, and the treatment of the property *per se* considered only in regard to its liability to seizure either as *cautio judicatum solvi* or in execution of a judgment rendered against a state although perhaps arising from circumstances entirely unconnected with the use of the property. Such a division reflects the common distinction between *"la jurisdiction"* and *"l'exécution."* On the other hand, a classification based on the independent treatment of all actions arising in connection with property—especially means of transportation—in conjunction with a consideration of execution and attachment offers some advantages, especially to those familiar with suits *in rem*, where the nature and use of the property as well as its ownership may be of decisive importance.

Attitude of Courts to French Government

From the national point of view, the attitude of the courts towards the French state as a carrier reflects the growing tendency to extend the jurisdiction of the judicial courts at the expense of the administrative tribunals. This is evidenced not only by the more recent decisions of the judicial courts but by those of the administrative tribunals as well.[1] The old notion that any liability which may devolve upon the state for injury caused to individuals as the result of acts of persons in its employ in public service escapes the competence of the ordinary courts and lies within that of the administrative authorities [2] has given way to the realization that in the

[1] *Cf.* note by G. Ripert, *Revue Internationale du Droit Maritime*, XXXIII (1922), 762.

[2] Commercial Tribunal of Marseilles, June 29, 1915, Dalloz, 1920-2-121; *Revue Internationale du Droit Maritime*, XXX (1915-17), 367.

conduct of public industrial services, the management of which the state has assumed, it places itself in the same situation as an ordinary business agency as regards the users of that service.[1] Thus the ordinary courts are competent in cases arising from labor contracts with employees of state railways, compulsory war-risk insurance issued by the state, in litigation with the senders and recipients of parcel-post packages, and in tort actions resulting from collisions of government-operated merchant vessels, or theft of merchandise committed aboard the same.[2]

Competence of Courts vis-à-vis Foreign States

Despite the growing tendency to subject the French state to the competence of the ordinary courts in various circumstances, there is no indication that the courts themselves contemplate a similar development as regards foreign states. Complete consistency is evidenced in the repeated refusal of the judicial courts to entertain suits instituted against such foreign government agencies as the United States Shipping Board. As the administrative tribunals are not open to foreign states, the result is that the latter are virtually immune from suit on the score of the use of their property as well as on general grounds. These suits, being brought *in personam*, are subject to the same rules as those controlling other suits against foreign states. A complicating circumstance, however, in regard to United States Shipping Board vessels has been the fact that they were frequently not operated directly by the government but by commercial lines, which in turn engaged the captain. The question then arose whether the captain, or the company, were acting merely as the agents of the government so as to be able to claim the immunities of the former. In denying their competence in such cases, the French upper courts made no distinction between direct and delegated operation, and

Suits in Personam

[1] *Conseil d'État*, December 23, 1921, *Revue Internationale du Droit Maritime*, XXXIII (1922), 760.

[2] *Cf.* Law of March 21, 1905, on competence in labor contracts; Law of July 12, 1905, on parcel post; Georges Ripert, *Condition juridique des navires appartenant à l'état*, etc., *Comité Maritime Internationale, Bulletin No. 51*, p. 16; Decision of Court of Appeal, Paris, July 20, 1921, *Revue Internationale du Droit Martime*, XXXIII (1922), 768; Commercial Tribunal, Nantes, August 2, 1919, *ibid.*, XXXII (1920-21), 445; Court of Appeal, Paris, December 20, 1921, *ibid.*, XXXIV (1922), 133.

although referring wherever possible to the public use of the vessel concerned, contented themselves with regretting the necessity of refusing to take jurisdiction when there was no evidence of any but a purely commercial undertaking.

Incompetent v. Captain of Naval Vessel

The case of the *Powhatan* came up before the Commercial Tribunal of Saint Nazaire on May 8, 1918.[1] This was an ex-German vessel which had been taken over by the United States and added to its war fleet. In denying the right of the captain of a vessel injured in collision with the *Powhatan* to proceed against her captain, the court observed that war vessels were considered floating portions of the national territory, and hence neither they nor their crews were subject to the laws or to the jurisdiction of any other state in whose waters they might be. This immunity applied not only to "war vessels" properly so-called, but to all vessels commanded by an officer of the navy and flying the naval ensign. At the time of the collision, the *Powhatan* was manned by a naval crew, commanded by a captain whose name appeared in the navy list, and was flying the American flag together with the naval pennant, and hence was held to be assimilated to war vessels.

Not Competent v. Captain of Government Merchant Vessel Used for National Defense

In the case of the *Hungerford*, which was a merchant vessel employed in the carriage of goods, the court held the same despite some further qualifying circumstances.[2] This was an ex-German vessel taken over by the English Crown, pursuing a voyage from Australia, bringing grain for the account of the French Government and wool for the English Government. It was operated for the latter by a commercial company under agreement with the Board of Trade. The captain was employed and paid by this company, and when he became involved in a collision with a French vessel, agreed to furnish security on terms of reciprocity to preclude the attachment of his vessel. Subsequently, suit was brought against the captain of the *Hungerford* to recover damages. The defendant pleaded to the jurisdiction, but the Commercial Tribunal of Nantes assumed jurisdiction, holding that no question of sover-

[1] *Revue Internationale du Droit Maritime*, XXXII (1920-21), 439.

[2] Court of Appeal, Rennes, March 19, 1919; *Revue Internationale du Droit Maritime*, XXXII (1920-21), 345.

eignty was involved.[1] Both the navigation company and the captain were subject to the jurisdiction of the court under Article 14 of the Civil Code. Furthermore, by putting up security the parties at least tacitly admitted the jurisdiction of the French courts. The Court of Appeal at Rennes reversed this decision. It held that in transporting grain and wool for the French and English Governments, the *Hungerford* was not employed commercially but for the national defense. The mere fact that she was not managed directly by officers of the English Navy could not change the nature or character of her use. Unless there had been a valid renunciation of immunity, the rules of extraterritoriality were applicable. The court below erred in assuming such a renunciation from the giving of security. The rule was that the renunciation might be express or tacit, but in either case it must be certain. This requirement was not fulfilled by an amicable agreement, before any suit had been instituted, to put up security. As for the company and its captain, they were properly to be considered agents of the English Government, and might raise any exception to the jurisdiction of the court which that government itself might raise. For these reasons the tribunal should have declared itself incompetent as did the Court of Appeal.

Incompetent v. Owner of Shipping Board Vessel Used in Commerce

In the case of the *Avensdaw,* a French ship broker asked the Commercial Tribunal at Rouen to condemn the United States Shipping Board as owner of the vessel for a large unpaid balance on a bill of repairs and advances to this merchant vessel, which had entered the French port in the course of purely commercial operations.[2] The defense was that the Shipping Board was identified with the United States Government, and hence could not be subjected to the jurisdiction of the court. In admitting this contention, the judge observed that it seemed as though the Shipping Board ought to be assimilated to an ordinary ship-owner, but that, as it did in fact constitute an administrative branch of the Government of the United States, it could not be cited before a French court even in the person

[1] June 29, 1918.

[2] January 20, 1922, *Revue Internationale du Droit Maritime,* XXXIV (1922), 1074.

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of its agents. This was true even as regarded a contract made within the jurisdiction of the court. In acting as broker for such a vessel, the plaintiff was deemed to have renounced the protection of French courts for any disputes arising in connection therewith. The court therefore declared itself incompetent.

Property per se

Thus the courts refused to permit a suit *in personam* arising from a contract or tort of a vessel operated by a foreign government whether the vessel was incorporated in the Navy, performing a special carrying service for the state, or engaged in purely commercial operations. The ownership and not the use appears to have been the ultimate criterion. This is not the full measure of protection afforded foreign state property, however. Not only is the owner state immune, but the property itself is inviolable. Interference with its free enjoyment is justified only by express permission from its sovereign proprietor. Such license cannot be presumed from other acts of submission on the part of the state, such as a voluntary appearance in a suit brought against it, or its election to use the courts itself as plaintiff. Nor does the purpose for which the seizure is desired modify this rule. Seizure on execution and attachment are equally precluded.

Saisie Conservatoire

That attachment does in fact frequently take place, especially of government-owned merchant vessels—only to be invalidated by subsequent court process—is due primarily to the technicalities of the *saisie conservatoire* in commercial cases. Any creditor who entertains a justifiable fear that the debtor may remove his property and so escape the payment of his obligation may resort to this form of attachment. It is not necessary that the debt should be liquidated, or payable, or its existence determined. But the applicant must have a *prima facie* case, there must be some real danger of his ability to recover otherwise, and the amount claimed must have some reasonable relation to the value of the property desired as security. If these conditions are satisfied, the President of the Commercial Tribunal, in summary *ex parte* proceedings, may authorize the detention of a vessel until the issue is determined and the obligation paid, subject to a right of the owner to procure its release by giving bond. Thus this attachment is a

fait accompli before the owner has a chance to reveal his status and claim exemption for his vessel. This situation is responsible for a number of cases.

The "Campos"

The case of the *Campos* involved the ratification of an attachment for debts due on account of advances to a former German vessel which had been taken over by the Republic of Brazil.[1] It was claimed on the one hand that the vessel was the property of the Government of Brazil, and hence was not liable to seizure. On the other hand, it was alleged that the vessel had been merely requisitioned, and hence could not be considered as forming a part of the public or private property of the Brazilian state. Moreover, by incorporating it in the fleet of the Lloyd Brazileiro and using it for commercial purposes, the state had renounced any immunity to which it might have been entitled. The court held, however, that the renunciation of a right had to be formal and not based upon presumption. Aside from voluntary renunciation, it was an incontestable principle that the property of a state was not liable to be attached for a debt of the state. This principle was recognized as applicable to the French state, and applied *a fortiori* to a foreign state. The fact that Brazil used the vessel it had confiscated for commercial purposes could in no wise modify the nature of the property or serve to confer a private character upon it. Nor could any distinction be admitted between debts of Brazil on account of the vessel in question and from any other cause. The seizure was inadmissible.[2]

The "Balosaro"

The *Balosaro* and the *Englewood* were two vessels of the United States Shipping Board which had been subjected to attachment. The captain of the *Balosaro*[3] claimed that this vessel was not liable to seizure for debt inasmuch as it was the property of the United States Government. He asked her release on this score. The creditor

[1] Commercial Tribunal of Havre, May 9, 1919, *Recueil du Havre*, LXII (1918-1919), I, 28; *Revue Internationale du Droit Maritime*, XXXII (1920-21), 600.

[2] See also the suit brought by the captain of the *Campos*, representing the Brazilian Government, for damages resulting from this arrest, *Recueil du Havre* LXIII (1920), I, 119.

[3] Commercial Tribunal of Havre, September 17, 1919, *Recueil du Havre*, LXII (1918-19), I, 31.

denied that the ownership of the Government had been sufficiently proved. The court accepted the proof, and ordered the release of the vessel, on the ground that property of a foreign state was not liable to seizure.

The "Englewood"

Permission to attach the papers of the *Englewood* had been granted by the President of the Civil Tribunal of Bordeaux. Upon proof that this vessel, although operated by the Cosmopolitan Line, belonged to the United States, the President revoked his former order and directed the immediate release of the ship's papers.[1]

The "Glenridge"

A similar case was that of the *Glenridge*, decided by the Commercial Tribunal at Havre, July 17, 1920.[2] An attempt was made here to attach a vessel of the United States Shipping Board as security for the payment for damage sustained by merchandise of French citizens. Despite the fact that the *Glenridge* was being operated for commercial purposes by a third party, the court ordered the release of the vessel on the ground that no attachment of state-owned property was possible.

If the numerous cases of attempted attachment of foreign government property are the result of technicalities of the *saisie conservatoire*, whereby the identity of the owner is not revealed until after the process is undertaken, the paucity of cases arising from attempted execution of a judgment is probably due to the inherently different nature of the *saisie executoire*, whose function is to secure the payment of a judgment already rendered. The right is no longer inchoate nor the amount uncertain. No "permission" is required, for the debtor is provided with a writ of execution from the court. In the course of the suit, the status of the parties will have become apparent; if the party against whom the judgment is rendered is a foreign state, no execution upon the property can be enforced against the will of the state, hence neither its vessels nor any other property can be seized. Thus, on May 5, 1885, the Court of Cassation refused to countenance the seizure of German Government property in execution

Saisie executoire

[1] Référé, April 27, 1920, *Gazette des Tribunaux*, 1920-2-367; *Revue Internationale du Droit Maritime*, XXXII (1920-21), 602.

[2] *Revue Internationale du Droit Maritime*, XXXII (1920-21), 599.

of a decision of a lower court against that state.[1] The imperial railway of Alsace-Lorraine had been condemned by a French tribunal to pay the plaintiff a certain sum in compensation for merchandise lost by it in transportation. The railway had admitted the jurisdiction of the court for questions arising from commercial operations, but it then refused to pay the damages. The plaintiff, therefore, seized all the property of the line at the station at Nancy. This seizure was validated by the civil court there, but was reversed on appeal. It was established that the railway was an organ of public administration under the Chancellerie of the German Empire, and that both its rolling stock and its earnings belonged to the German state. The railway in recognizing the jurisdiction of the court did not admit its competence to enforce the execution. In France, one could not seize goods of the state in execution of a judgment against it. It was held that what could not be done against the French state could not be done against a foreign state. The law of nations granted the latter complete immunity in this respect. In affirming this decision, the Court of Cassation considered only the fact of the public character of the operation of this railway, and then stated it as an absolute principle of law, that a creditor, even to assure the execution of a judgment, could not seize the property of a foreign state.[2]

French Government-owned Vessels Before Foreign Courts

It is apparent that the ownership of the property and not the nature of the use to which it may be put is the controlling element in the immunity of government-owned property from seizure in France, whether for security or in execution of a judgment. Yet there has been recognition of the fact that the courts of other countries might not take the same view with regard to French government-owned merchant vessels abroad. When, in 1840, the French Government, realizing the inherent possibilities in steam-propelled vessels, committed itself to the ownership and operation of a commercial line

[1] Dalloz, 1885-1-341; Sirey, 1886-1-353.

[2] See also a decision rendered by the Court of Appeal of Paris on March 22, 1889, regarding the seizure of property of the state of Portugal, *Journal du Droit Internationale Privé*, XVI (1889), 461.

between France and the Americas, questions were raised before the Chambers as to the status of the vessels so used should they become involved in litigation abroad. It was said that the government's proposal would create an anomalous situation in that a vessel flying the royal pennant was not a merchant vessel; whereas, a vessel carrying passengers and commercial cargo ceased to be a vessel of the Royal Navy. It was pointed out that the immunities accorded to public vessels depended upon their keeping aloof from interests of a private nature. The essential characteristic of a vessel of state was that it might be made war upon but not sued. It seems to have been admitted by the reporter to the Chamber of Peers that unless some agreements could be made with foreign states, releasing these vessels from the ordinary obligations of merchantmen as regarded customs, jurisdiction of commercial courts, and attachment, their commercial character would take precedence over their public qualities.[1]

Law of July 16, 1840

In practice the question appears not to have been solved either then or later. At the close of the World War, when France again found itself possessed of certain vessels not of a public character, the prompt liquidation of this merchant fleet prevented it from becoming the source of any difficulty as regarded questions of jurisdiction.[2] When it has been desired to accord immunity to certain privately owned vessels performing public service, this has been accomplished by treaty. France has thus covenanted with several states as regards mail packets. By treaties with Italy of March 3, 1869 (Article 6), and November 18, 20, 1875 (Article 14), vessels employed in the Mediterranean by the postal administrations of France and Italy respectively, whether owned, chartered or subsidized by the state, were to be exempt from attachment, embargo or *arrêt de prince*. When, therefore, an attempt was made to seize such a vessel in execution of a judgment for damages growing out of a collision in which it had been involved, the Court of Appeal at Aix in a decision of August 3, 1885, declared the attachment

Mail Packets

[1] *Moniteur Universel*, June 30, 1840.

[2] By a law of August 9, 1921, the liquidation was to be complete by July 31, 1923. *Bulletin Officiel de la Marine Marchande*, 1921, 693.

null and void. It having been established that the *Solunto* was a bona fide mail packet employed by the concessionary of the Italian postal service subsidized by the state, the court refused to consider the question of its actual ownership. The plaintiff further relied upon the fact that the vessel had touched at the port of Marseilles for purposes of commerce only, that not being a port of call on its regular itinerary as a mail packet. Moreover the Italian Consul had lent his assistance in bringing about the attachment without apparently having thought of claiming the privilege which the Italian Government subsequently invoked. The court declined to see in these facts any ground for excluding the *Solunto* from the immunity accorded by the treaty.[1]

Discussion of Proposed Convention 1922

When the *Comité Maritime International* at its London conference in 1922 proposed working out an international convention on the juridical position of state-owned vessels, the *Association Française du Droit Maritime* had an opportunity to give formal expression to its views on the subject. The latter were not in complete conformity with the practice of the courts. According to the report of Monsieur Georges Ripert [2] there was no need to include war vessels in the proposed convention. Their position, while not entirely satisfactory, was at least definite and uniform. They were not subject to the jurisdiction of the courts nor were they liable to seizure.

War Vessels

Vessels Employed in Other Public Services

As regarded vessels used in other public services the issue was less clear. To omit them also from the proposed attempt at unification would doubtless facilitate arriving at an agreement, but from the juridical point of view was not satisfactory. Hence the French group, not only proposed their inclusion, but desired that they be expressly subjected to the jurisdiction of the courts. There being no action *in rem* known to French law, this would be tantamount to subjecting the owning or operating state to the courts for actions arising in connection with the operation or management of the vessels. Whereas there seemed to some members of the French Association to be no sufficient reason for exempting these vessels from an attachment, it was ultimately decided that due to the pub-

[1] *Revue Internationale du Droit Maritime,* [I] (1885-86), p. 225.
[2] *Comité Maritime International, Bulletin No. 51,* pp. 1-33.

lic nature of the employment no seizure of any sort should be permitted against them. This was not in derogation of the competence of the courts to hear the suit, for in France that follows from the nationality of the plaintiff. If, however, the creditor was to be deprived of this security, the state on its part might not avail itself of any legal provision sanctioning a limitation of liability, once its responsibility had been established by the courts.

Merchant Vessels

Merchant vessels, whether owned directly by the state or operated by it, were to be assimilated to ordinary vessels engaged in commerce, *i.e.*, they were not only to be subject to the jurisdiction of the courts, but were to be liable to attachment as well. Lest the temptation might arise from these circumstances to enlarge the conception of public service, its connotations were to be expressly limited.

Proposed Rules 1922

These views were drawn up in the form which they might assume in an international convention, and were submitted to the *Comité Maritime International:*

Règle I. Les actions dirigées contre un Etat étranger à raison de l'exploitation des navires lui appartenant ou gérés par lui, ainsi que les actions réelles relatives à ces navires (et à l'exclusion dans les deux cas des navires de guerre) peuvent être portées devant les tribunaux qui seraient compétents pour statuer sur les actions dirigées contre un armateur étranger ou contre un navire appartenant à un armateur étranger.

Règle II. Les vaisseaux de guerre et les navires appartenant à un Etat, ou affrétés par lui, et affecté dans cet Etat à l'execution d'un service public ne peuvent faire l'objet d'aucune saisie dans un autre pays pour quelque cause que ce soit. Par contre, l'Etat ne peut se prévaloir, pour les obligations nées de l'exploitation de ces navires, des dispositions légales limitant la responsibilité des propriétaires de navires.

Règle III. Les navires de commerce appartenant à un Etat peuvent être saisis dans tous les pays pour sureté des créances nées à raison de l'exploitation de ces navires.

Règle IV. Sont considérés comme navires de commerce d'Etat les navires affectés aux transports des passagers ou des marchandises, alors même que l'Etat les affecterait au transport de cargaisons lui appartenant, sauf le cas où les marchandises sont destinées aux besoins des services publics de cet Etat.

Règle V. Les cargaisons appartenant à un Etat peuvent être saisies pour sureté des créances contre cet Etat nées à l'occasion de leur transport, à moins qu'elles ne soient destinées à un service public de cet Etat.[1]

Discussion of Proposed Convention 1923

The text proposed by the *Comité* did not reproduce these rules, and when at the Gothenburg Conference in 1923 the subject was again up for discussion, the French delegation explained its objections to the version before the assembly and again submitted a text of its own.[2] The French Association was anxious that the import of certain terms be made clear. For instance, the provisions were to apply only to international issues, so as not to affect internal laws relating to state liability vis-à-vis its own subjects. Moreover the application of the proposed convention was limited to the question of the liability of the state to submit to the jurisdiction of the ordinary courts, and to have its property attached under certain circumstances. It should not operate to subject the state to all the liabilities and obligations of private shipowners. Furthermore, as regarded the seizure of its vessels, such an act was open only to those having a claim arising in connection with the vessel in question, not to all creditors of the state nor even to all creditors basing their claims on the maritime or commercial undertakings of the state.

To meet these requirements the following text was proposed:

Article I. Les navires de mer et les cargaisons appartenant à l'Etat peuvent être saisis, dans les mêmes conditions que les navires des armements privés de même nature et que les cargaisons appartenant à des propriétaires privés, par les créanciers dont la créance se rapporte à l'exploitation du navire saisi ou au transport de la cargaison.

Article II. Les actions intentées par ces créanciers contre l'Etat seront portées devant les tribunaux compétents pour statuer sur les actions de même nature introduites contre un armateur ou un propriétaire de cargaison, personne privée.

Article III. Toutefois, les tribunaux de l'Etat proprietaire du navire ou de la cargaison sont seuls compétents et la saisie est impossible lorsqu'il s'agit:

[1] *Comité Maritime International, Bulletin No. 51,* p. 32.

[2] *Comité Maritime International, Conférence de Gothembourg,* 1923, *Bulletin No. 59,* pp. 1-9.

a) de navires de guerre,
b) d'un autre navire de mer appartenant à l'Etat ou affrété par lui et affecté exclusivement à un service public,
c) de cargaisons appartenant à l'Etat et transportées par lui pour un service public.

Article IV. Les dispositions de la présente convention seront appliquées dans chaque Etat contractant dans tous les cas ou le créancier intéressé n'est pas national de l'Etat propriétaire du navire ou de la cargaison auxquels se rapporte la créance.[1]

The convention drawn up by the Diplomatic Conference at Brussels in 1926 was signed by the French delegates, but appears not to have been ratified to date.

Proposed Text, 1923

In France, any change in the practice of according complete immunity to foreign states and their property promises to come not from the judiciary, but as the result of an international treaty. The courts have been scrupulous in applying the general international-law doctrine. They have denied their competence to hear a suit instituted against a foreign state unless it was deemed to have submitted to its jurisdiction. Whereas they have interpreted the submission rather broadly as to its general effects; they have recognized that it did not extend to the execution of a judgment against the state. In national matters, the jurisdiction of the administrative tribunals has tended to give way in favor of the judicial courts as regards means of transportation operated by the state. From the international point of view, however, a government may enter the carrying trade without prejudice to its security from suit. As regards the agencies by which this enterprise is carried on, not even attachment as security is permissible.

Conclusion

It is this conservative attitude of the courts, which has led the maritime interests of the country to attempt another way of reducing the handicap under which private shipping labors in competition with the protected government industry. It is submitted that the success of their efforts will be a more desirable method of bringing about the result than would attempted reform on the part of the courts.

[1] *Comité Maritime International, Conférence de Gothembourg,* 1923, *Bulletin No. 59,* p. 9.

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